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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 218

EMORY W. PARSONS, ERMA M. PARSONS, HOWARD H. PARSONS, et al., PETITIONERS,

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania, RESPONDENT.

No. 305

GEORGE HUSS, RUSSELL HUSS, et al., PETITIONERS,

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania, RESPONDENT.

BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

The Estate of John Schumacher, as amicus curiae, with the consent of petitioners and respondent (through the Solicitor General), hereby files this brief in support of the petitioners in these cases, which are before this Court on writs of certiorari to the United States Court of Appeals for the Third Circuit.

INTEREST OF AMICUS CURIAE

The issue here involved—whether a strip miner of coal has an economic interest and is therefore entitled to depletion on his income for mining—is the same issue involved in a series of cases now pending in the District Court of the United States for the Eastern District of Pennsylvania: *Estate of John Schumacher* v. *U. S.*, Docket Nos. 13,191 and 13,189; *Estate of Henry E. Schultz* v. *U.S.*, Docket Nos. 13,190 and 13,192; and *Robert Rowland* v. *U. S.*, Docket No. 14,625. In addition, the listed taxpayers (all of whom are represented by undersigned counsel) have the same issue in other tax years involved in other cases now pending, in which refund claims have been filed and rejected and suit about to be filed, probably in the United States Court of Claims.

QUESTION PRESENTED

Is a strip miner of coal entitled to a share of the percentage depletion allowance where he mines the coal pursuant to a contract giving him the exclusive right to extract coal from a particular property and where he is paid only upon the discovery and extraction of the coal? Or, does the stripper lose this right because his pay is not dependent upon the price at which someone else ultimately sells the coal and because the other party to the contract has the right to terminate the contract?

SUMMARY OF ARGUMENT

Although this Court has never passed on these questions as they apply to the coal industry, the principles this Court has enunciated in the oil cases in interpreting the same fundamental statutory provisions which control here, make clear the answers to these two questions.

The answer to the first question is yes: a strip miner who undertakes the job of looking for and extracting

whatever coal he finds and who is paid only for what he finds has the "economic interest" which this Court has said is the prerequisite to the right to share in depletion.

The answer to the second question is no: neither the method of the strip miner's payment, nor the right of the other party to the contract to cancel that economic interest, has anything to do with the determination of the existence of that economic interest in the first instance.

The Court below erred therefore in denying these strip miners the right to share in the depletion allowance. The Court below erred in not following this Court's decisions in such cases as *Palmer* v. *Bender*, 287 U.S. 551 (1933); *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. 599 (1946); *Burton-Sutton Oil Co.* v. *Commissioner*, 328 U.S. 25 (1946); and most recently, *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308 (1956); in not following the decisions of the Court of Appeals for the Fourth Circuit in such cases as *Commissioner* v. *Gregory Run Coal Co.*, 212 F.2d 52 (1954), *Commissioner* v. *Hamill Coal Corp.*, 239 F.2d 347 (1956), and *Weirton Ice & Coal Supply Co.* v. *Commissioner*, 231 F.2d 531 (1956); in not following its own earlier decision in *Commissioner* v. *Mammoth Coal Co.*, 229 F.2d 535 (1955).

ARGUMENT

Introduction

In the cases cited above, this Court outlined the basic concept of economic interest as it applied to depletion of oil interests. In the most recent of those cases, *Southwest Exploration Company*, this Court restated the two basic requirements for depletion which it had previously laid down in *Palmer* v. *Bender*, in this manner (350 U.S. at 314):

> " . . . a taxpayer is entitled to depletion where he has: (1) 'acquired, by investment, any interest in the oil in place,' and (2) secured by legal relationship income derived from the extraction of the oil, to which he must look for a return of his capital."

The Court had also said substantially the same thing in *Burton-Sutton:* it is the operator's "possibility of profit from the use of his rights over production depending solely upon the extraction and sale of the oil which marks an economic interest in the oil" (328 U.S. at 34).

Since the statute providing for depletion is the same for both oil and coal, it should follow without question that these principles apply as well in the coal cases. Thus: the strip miners here acquired the right to strip mine coal from designated areas; they committed their assets and their entire business operation to finding and extracting the coal; they assumed all the risks inherent in finding and getting the coal out of the ground; and they were paid only if they found, extracted, and delivered the coal as per contract. They should therefore be held to have an economic interest and to be entitled to participate in depletion on their income from mining.

But the Court below held that although all these facts were true, the strip miners were still not entitled to a share of the depletion allowance because certain additional requirements were not satisfied; because the strip miners were paid without regard to the market price of the coal and because the party for whom the stripping was being done had the right to cancel the contract on short notice. As already stated, we urge that the Court below was wrong; that these secondary and extraneous circumstances have nothing to do with the initial question of the existence of an economic interest sufficient to support the depletion allowance.

Since this is this Court's first consideration of the application to the strip coal mining industry of the concept of economic interest, it might be helpful to review briefly the background of the overall question.

Legislative History

The first statutory provision took the form of cost depletion. Because natural resources inevitably are exhausted, the owner of those resources was allowed to recover his cost (or March 1, 1913 value, if higher than cost). This allowance involved but two elements: ownership, and proof of cost or March 1, 1913 value. See *United States* v. *Ludey*, 274 U. S. 295 (1927). This allowance was extended to a lessee by judicial decision in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364 (1925), dealing with the Revenue Act of 1916. The Revenue Act of 1918 (Section 214) specifically provided for an equitable division of the cost depletion allowance between lessor and lessee.

That same Act contained also the first step away from the conventional concept of depletion as a method of recovering cost. The new approach resulted from the legislative desire to encourage operations designed to get the coal above the ground. "To stimulate prospecting and exploration" of mineral deposits discovered after acquisition of the property, Sections 214(a)(10) and 234(a)(9) of the 1918 law provided for a limited tax on the sale of certain mineral producing properties and for depletion based on the value of those newly discovered resources. Senate Report No. 619, 65th Cong., 3d Sess., 1939-1, Part 2, Cum. Bull. pp. 121, 122.

But this new concept, unrelated to cost, involved burdensome administrative difficulties in proving the value of the newly discovered mineral deposits. Accordingly, retaining the fundamental idea that cost was not an integral part of any depletion allowance, Congress conceived the idea of percentage depletion. This first appeared in the Revenue Act of 1926 as to income from oil and gas wells and was extended to coal mining in 1932. As an inducement to the miner, percentage depletion could be taken so long as gross income was derived from the mining operation, despite the fact that the allowance

resulted in a deduction many times the amount originally invested or the mine's discovery value at the time the mining operation began. This fundamental aspect of percentage depletion was restated in 1951:

> "Under the present law, the amount of percentage depletion bears no relation to the capital cost of the property, but only to the income. . . . [S]ince the percentage depletion allowances are unrelated to the captital the tax-free recoveries through percentage depletion are often many times the original investment." 97 Cong. Rec. 12307.

Finally, Congress showed further need to induce mining by allowing percentage depletion without regard to whether the mine represented a new discovery. See 4 Merten's Law of Federal Income Taxation, § 24.31a (1954).

This brief analysis of legislative history discloses two things:

First, that percentage depletion has nothing whatsoever to do with recovery of cost or any other investment in the ordinary sense to acquire the particular natural resource involved. Thus when the cases speak about the taxpayer being permitted to "recover" his "investment" or "capital", it is obvious that they are referring not to a cost or capital outlay made by the taxpayer to acquire the right to receive the coal, but rather to what the taxpayer acquired by signing the binding contract which conferred upon him the exclusive right to extract the coal in place.*

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* This should suffice to dispose of a third ground used by the Court below for denying depletion to these strip miners. That Court said that the investment in machinery suitable for other than stripping purposes does not constitute the kind of investment needed to warrant the allowance of depletion. This point is without meaning here. The type of investment talked of with regard to depletion has nothing to do with machinery of any kind or the expenditure of money to buy a lease or fee or the outlay of any sum of money for any such purpose. As this Court said

Second, that the purpose behind percentage depletion is to encourage coal mining by providing a special tax benefit to those persons who actually extract the coal and take the risks inherent in mining. This is accomplished by allowing a deduction from the taxpayer's gross income derived from mining.

The Business Of Strip Coal Mining

A strip miner mines from the surface of the earth. He does not drive shafts into the earth to reach the coal as does a deep miner. In general, the mining is performed by stripping off the earth, known as overburden, which lies over the coal and removing the coal thus uncovered. The overburden is stripped by making "cuts" in the earth, the overburden from each cut being deposited in the adjacent cut from which the coal has been removed. The operation resembles plowing a field except that the "furrows" may be two hundred feet deep. Strip miners sometimes use scrapers for removing the overburden, but where the coal is farther from the surface the scrapers are replaced by draglines. These are massive machines which have tremendous booms from which are suspended by cables huge buckets capable of scooping up large quantities of earth at one time.* Cuts

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in the *Southwest Exploration Company case*, (350 U.S. at 312), depletion "continues so long as minerals are extracted, and even though no money was actually invested in the deposit".

Were this not so, no stripper under a salvage contract would ever have the kind of investment which would support the depletion allowance. If the law required a cash outlay for the purchase of "something depletable", no strip miner would ever be entitled to depletion. The opinion of the Court below on this point conflicts with every decision allowing depletion to a strip miner, as well as with this Court's decision in *Southwest Exploration Company*.

* Examples of the type of equipment used in strip mining, and their respective current costs, are: 32 yard dragline, $1,500,000; 25 yard dragline, $800,000; drill, used in attempting to locate coal, $120,000; 8 yard "straight front truck loader", $300,000; 32 ton delivery truck, $65,000.

from thirty to sixty feet wide and from five to two hundred feet deep are made with a dragline. Once the coal is uncovered it is cleaned, loosened with dynamite, removed by loading shovels, and transported by truck to the coal tipple.

Because of the nature of the operation there is a substantial risk of unprofitability in strip mining. Thus, different seams of coal separated from each other by a layer of earth, do not appear uniformly throughout a given area, but often have faults which cut them off. Moreover, the seams do not run at a uniform depth below the surface of the earth. At some points they come to the surface (known as cropping), thus ending the strip mining operation at such points. At other points the seams go into the earth at a steep pitch. In such cases the strip mining operation ceases to be profitable because a steep pitch greatly increases the amount of overburden to be removed within a short distance and makes it more difficult, if not impossible, to remove the coal with strip mining equipment.

Specific strip mining projects frequently call for the stripping of coal from large areas requiring several years. In many instances, the owner of the property supplies only the land, some maps and geological surveys; the stripper takes over from there. He supplies his own men, materials and equipment; he pays all expenses of the operation, including insurance and local taxes of all kinds; he builds all necessary roads and makes other improvements required to proceed with the mining. In a word: the stripper moves his own organization in and proceeds with the project. In some cases as where the property owner is also a coal company, it undertakes some of these responsibilities, such as having its superintendent inspect the stripper's equipment and stripping methods and approve the rate of operation, the particular direction on the tract in which the work is to proceed, and so on.

But basically, the work is done by the stripper at his risk.

Despite these risks inherent in discovering and extracting the coal and his substantial initial investment, the stripper mining under a salvage contract receives no payment whatever until the first truck load of marketable coal is delivered to the owner's tipple. His income is thus dependent entirely upon production of the mineral.

The Strip Miner's Right To A Share Of Depletion

In these circumstances there is no dispute over the basic fact that income earned in the mining process is subject to the depletion allowance. The question is: who is to share in the deduction? If coal is sold for, say, $3.50 per ton, does that full amount represent the income from mining of the land owner, or if the land owner has paid the stripper, say, $2.50 of that amount, does that $2.50 represent the stripper's income from mining and is it therefore subject to his own deduction for depletion, leaving to the land owner only the remaining $1.00 as his income from mining and confining his depletion deduction to that amount?

As matters developed, it soon became reasonably clear that the strip miner was entitled to share in the depletion deduction where he had the right to mine a designated area and was said only out of coal he mined. *Eastern Coal Corp.* v. *Yoke,* 67 F. Supp. 166 (N.D.W.Va. 1946). Under those circumstances, it was felt that the stripper had the required "economic interest in the mineral in place", this Court's concept of the sine qua non for depletion. *Palmer* v. *Bender, supra.*

As strip mining developed and as the general concept of depletion expanded, the stripper's efforts to secure some of the tax benefits attracted the attention of the Internal Revenue Service as an industry-wide matter.

This culminated in the issuance in March, 1950 of General Counsel's Memorandum 26,290 (1950-1 Int. Rev. Cum. Bull. 42). Although the GCM was a careful and thorough analysis of the entire situation, it started two lines of litigation, both of which have now joined in the two cases now under review.

The Need For The Stripper's Reliance On Sale

One of these lines stemmed from the phrase "extraction *and sale*" in that part of the basic rule that says the taxpayer must look to the extraction of the mineral in place as his sole source of return. The two words "and sale" seem to have crept in accidentally, by virtue of their original use to describe the fact that in most instances in the oil business, the mineral was in fact sold and the particular taxpayer involved was in fact paid out of the proceeds of sale.* But whatever the origin of those two words, the Tax Court allowed depletion to the strip miner who was paid a percentage of the coal company's sales price of the coal, but denied it to the stripper who had substantially all the same rights and privileges but who was paid a fixed price per ton without regard to the coal company's disposition of the coal. In effect the Tax Court's position was that the facts fell within one class [economic interest: *Ruston*, 19 TC 284 (1956)] or another [no economic interest: *Morrisdale Coal Co.*, 19 TC 208 (1952)] depending upon reliance on sale. In the first appellate court ruling on the question, the Court of Appeals for the Fourth Circuit in *Commissioner* v. *Gregory Run Coal Co.*, *supra*, saw no significance in any such distinction for depletion purposes. That Court reiterated that position in each of its subsequent decisions on

* The currently proposed Treasury regulations use the words "extraction *or* sale" (italics added). Sec. 1.611-1(b). These regulations are proposed under Sec. 611 of the 1954 Code which is, in this respect, substantially the same as Sec. 23(m) of the 1939 Code which governs these cases.

the point. *Hamill Coal Corp., Weirton Ice & Coal Supply Co.*, both *supra*, and *Stilwell* v. *U.S.*, 250 F. 2d 736 (4th Cir. 1957). The Court below agreed in its first decision on the question in *Mammoth Coal Co., supra*, where it said (229 F.2d at 538):*

> "The fact that, instead of retaining coal, the stripper received so much per ton for that coal which first had to be offered to and accepted by the . . . [coal company] should make no difference, for in any event the stripper had to look to the coal which it mined for return of its investment and profit."

That is precisely the contention we advance here: if strip miners A and B have identical rights, which would entitle them to depletion, the fact that A is paid a fixed price per ton for the identical mining operations can not operate to produce a tax result for him directly opposite to what is applicable to B just because the latter's pay fluctuates with the price of the coal on the coal market.

The method of payment to the strip miner has no bearing on the question of the existence in the first instance of an "economic interest", on the question of the federal income tax significance of the right to extract coal from particular property, when the extractor is paid, if, and only if, and when, the coal is extracted, thereby assuming all the risks inherent in finding and getting the coal out of the ground.

We urge that this fundamental proposition in no way depends upon whether the strip miner's economic interest in the coal continues *after* it has been discovered and

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* The only other appellate court decision on the question is *Usibelli* v. *Commissioner*, 229 F.2d 539 (9th Cir. 1955) which the Fourth Circuit in *Weirton, supra*, distinguished on the grounds that the strip miner's contract was a one-year contract for the U.S. Army which contracted to pay a certain sum for services rendered so that the taxpayer did not depend upon solely the severance of the coal for his income. 231 F.2d at 536.

mined and turned over to the coal company or anyone else for sale.

Against this background, it is difficult to understand the reasoning of the Court below in reviving a distinction which that Court itself had helped dispose of in *Mammoth*. Yet clearly the effect of the instant decisions below is to emasculate *Mammoth*. The dissenting judge on rehearing below put it this way (255 F.2d at 603):

> "There is also no room for doubt that the taxpayers depended solely upon production for their return, since they received only the agreed price per ton for coal produced and delivered. Indeed, they bore all risks of mining, including, but not limited to, the finding and production of commercial quality coal in such quantities necessary to make operations profitable.
>
> Until now, every appellate decision in this type of case, including our own decision in *Commissioner* v. *Mammoth Coal Co., supra,* has held that there is no requirement that the stripper must assume the risks of the ultimate market. To the extent that we now hold otherwise, we are in conflict with our decision in that case and with the decisions of the Fourth Circuit. We are also in conflict with the latest pronouncement of the Supreme Court, *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. at page 314, that the taxpayer must look solely to the extraction of the mineral for his return. That is what the taxpayers here had to do."

The mystery of the Court's action below in ignoring its own earlier decision in *Mammoth*, as well as the opinions of this Court and of the Court of Appeals for the Fourth Circuit, is heightened by the fact that in its brief in these cases below (page 18), the government apparently conceded that the method of payment cannot operate to deny depletion where the other requisites are satisfied.

> "When an agreement defines a particular area in which a strip miner is to work and grants to him the exclusive right to mine that area until the mineral

supply is exhausted, and provides that all coal mined is to be delivered to the land owner *in return for a stated amount per ton delivered,* it is our position that the miner's relationship with the mineral in place is such as to entitle him to an allowance for depletion; the existence of his interest is coterminous with the existence of the mineral deposit and as each ton of coal is extracted that interest necessarily becomes less valuable." (empsasis added)

Even the government seems to agree then that the status of the coal market at a particular time, a question of salesmanship having nothing whatsoever to do with mining, should not affect—let alone determine—the existence or non-existence of an economic interest.

This same conclusion is dictated by the statutory definition of "gross income from mining". Section 114(b)(4)(B) of the Internal Revenue Code (1939), provides that mining is considered to include, "not merely the extraction of the ores or minerals from the ground" but also the subsequent ordinary treatment processes necessary to obtain the commercially marketable product as well as certain transportation costs. No reference whatsoever, however, is made to the sale of the mineral. The inclusion of the subsequent processes, of course, does not mean that a taxpayer who assumes the risk inherent in the basic job—i.e., extraction of the ore—is denied percentage depletion because he is not *also* involved in the fringe and later processes which are also given the benefit of percentage depletion. Rather these subsequent processes are specifically included so as to make it clear that the gross income upon which the deduction is based is not limited solely to that derived from the extraction.

The vice in the position of the Court below on this point is that not only does it tack on the selling process, found nowhere in the Code, but it makes that process a *sine qua non* of enjoyment of percentage depletion for those taxpayers who perform extraction *and* some or all of the other activities specifically set forth in the statute.

As the Court of Appeals for the Fourth Circuit said in the first appellate court decision on the issue, *Gregory Run Coal Co.*, (212 F.2d at 61):

> "We think, however, that in the pending case the rights of the producers were completely dependent upon the extraction of the salable product and that consequently they were entitled to share in the benefits of the statute which were designed to give compensation to persons interested in the production of a wasting asset."

Under the principles established by this Court in the oil and gas cases, against the background of the governing legislative history, and as those principles have been applied in other cases, it is clear that the strip miners here involved have an economic interest and are entitled to a share of the depletion allowance.

The Significance Of Terminability Of The Stripping Contract

The second element of GCM 26,290 which is involved in these cases concerns its provisions dealing with the right of the party for whom the stripping is being done to terminate the contract.

Here again a condition has been engrafted—without foundation—on the basic principles announced by this Court as to the economic interest concept required to support a share of the depletion allowance. This Court has in effect already indicated its opinion that this factor is without significance. In the *Southwest* case, the contract between Southwest (the operator) and the upland owners provided that the operator had the election to amend or surrender its drilling easement from the state, thereby terminating the upland owner's contract and his basis for sharing in depletion. Despite the fact that the operator in opposing the upland owner's attempt to share in the depletion made the specific argument on brief (p. 1) that this right of termination destroyed the upland

owner's economic interest, this Court did not even consider the point in its opinion. But with regard to such similar contentions that the operator might have drilled without using the upland owners' land or that the controlling state law might have been amended so as to eliminate the need for using that land, this Court said simply. "But none of these possibilities occurred." (350 U.S. at 316)

The Court of Appeals for the Fourth Circuit made the even more categorical in three decisions dealing with the precise point. In the *Weirton* case (231 F. 2d at 535), that Court stated:

> "It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the event proved Weirton actually mined the coal during all of the taxable years."

The Fourth Circuit reached the same conclusion in the *Gregory Run* and *Hamill* cases despite the right of the coal company in those cases to terminate on 30 and 90 days' notice respectively.*

The dissenting judge on rehearing below took the same position (255 F.2d at 602):

> "I agree with the view of the Fourth Circuit that the right of termination does not affect a stripper's right to depletion where the requisite economic interest as defined by the Supreme Court exists. The Commissioner and the courts must deal with a situa-

* Cf. *Stilwell* v. *U.S.* 250 F.2d 736 (4th Cir. 1957) where, after citing with approval its three earlier decisions listed above, the Fourth Circuit held that there was no right of termination, but then went on, unnecessarily, to use language—in one sentence—which could indicate some confusion as to the significance of terminability. The Court below made no point of this and in fact included *Stilwell* in the same category with the other three Fourth Circuit decisions which the Court below described as "recent borderline cases".

tion as it exists during the taxable year involved and not as it might exist in some future year because of the possible occurrence of an event through the exercise of a contractual right."

We urge that these cases and the dissent below are sound. The contract power to terminate the stripper's economic interest has nothing to do with the existence of that right in the first instance. The power of termination is relevant only if it is actually exercised and then only because it may affect gross income from mining which thus in turn affects the amount of depletion allowance. But these quantitative considerations are of no greater moment here, in relation to the basic question of the *right* to depletion, than are such things as the cost and life of an asset in relation to the existence of the *right* to (as opposed to the amount of) depreciation. Obviously, the lower the cost and the longer the life of an asset, the smaller the amount of the annual deduction for depreciation. But the *right* to any deduction at all exists even if the asset cost only $10.00 and has a life of ten years. So here: the cancellation of a contract or the reduction of the tonnage to be mined may reduce the amount of the income from mining and therefore necessarily the amount of the deduction for depletion. But these *quantitative* considerations have no other relevance. They cannot affect the basic, initial question of whether there is an economic interest to start with.

The irrefutable soundness of this conclusion is demonstrated by the difficulties created by any effort to determine the point at which these limitations of quantity are effective to prevent the existence of an economic interest. In G. C. M. 26290, *supra*, the Commissioner decided that if a stripping contract cannot be terminated within a period of less than one year, then ordinarily the stripper has an economic interest because he has enough time to mine "*a substantial* portion of the mineral deposit" (italics added). What is "substantial"? Suppose the prop-

erty involved is sufficiently large as to require fifteen years to complete its stripping and that unusual amounts of overburden make it clear that disproportionately small amounts of coal will be mined in the first several years? Is less than 1/15 of the coal involved "substantial"? Furthermore and of more fundamental importance, is it not entirely consistent with the whole history and purpose of percentage depletion—and in fact do not that history and purpose require the conclusion—that the stripper acquires an economic interest upon the signing of such a contract pursuant to which, at his sole risk, he contributes his business organization to the enterprise; that the only significance of cancellation and the like is in relation to the monetary tax result which flows from the existence of that interest in the form of the deduction for depletion.

Continuing with the GCM, it provides that where the stripping contract is terminated on less than one year's notice, then all the facts must be considered in determining whether that power to terminate prevents the creation of the economic interest in the first instance. Among the facts listed are the size of the deposit and the estimated time required for its extraction. Thus, if cancellation requires notice of one year and a day, the presumption is that the stripper has an economic interest; but if notice need be for only 364 days, then it depends on whether the stripper has enough time to qualify his rights as an economic interest. Yet in each case both strippers perform exactly the same function in the same manner under the identical contract giving them identical rights and obligations, the only difference being two days in the notice period. There is no sound basis for this distinction insofar as the fundamental issue of the existence of an economic interest is concerned. We submit that that issue is not affected by the limits on the amount of coal to be mined or by any other consideration going to the value of the strip-miner's interest.

CONCLUSION

A strip miner of coal who contributes his business organization to a strip mining enterprise under a contract pursuant to which he is paid only out of the coal he discovers, extracts and delivers, has no less of an economic interest than the oil driller in *Palmer* v. *Bender* or the upland owners in *Southwest Exploration Company*. Such a strip miner has acquired an interest in the coal in place and he derives income from the extraction of that coal to which he must look for his compensation. Such a strip miner is entitled to a share of the depletion allowance, without regard to the method by which he is paid or the fact that his stripping contract can be terminated. Those considerations are relevant solely as to the secondary question of how much income from mining the strip miner might realize; those considerations have nothing to do with the initial question of whether the strip miner has an economic interest in the coal in place. This result is dictated by the legislative history and the prior decisions of this Court. The Court below erred in finding to the contrary. Its decisions should be reversed.

Respectfully submitted,

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